ANDREW V. JABLON (SBN 199083)
E-Mail: ajablon@rpblaw.com
LINDSAY D. MOLNAR (SBN 275156)
E-Mail: lmolnar@rpblaw.com
RESCH POLSTER & BERGER LLP
9200 Sunset Boulevard, Ninth Floor
Los Angeles, California 90069-3604
Telephone: 310-277-8300
Facsimile: 310-552-3209

Attorneys for Defendant Robert Stein

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

SCOTT BARBOUR, individually, and ZB FAMILY TRUST, SCOTT BARBOUR, Trustee,

Plaintiffs,

vs.

BRET SAXON, an individual; CONDUIT MEDIA, INC., a California corporation; TMP, INC., aka TRANSACTIONAL MARKETING PARTNERS, INC., a California corporation; ROB STEIN, an individual; and DOES 1 through 50, Inclusive,

Defendants.

Case No. CV 11-02335 DMG (JCGx)

NOTICE OF MOTION AND MOTION OF DEFENDANT ROBERT STEIN TO DISMISS PLAINTIFF'S COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Declaration of Andrew V. Jablon in support thereof filed concurrently]

Hearing
Date: April 25, 2011
Time: 9:30 a.m.
Crtrm.: 7

Trial Date: None Set

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on April 25, 2011 , 2011, at 9:30 a.m., or as soon thereafter as counsel may be heard, in Courtroom 7 of the above-entitled Court, located at 312 N. Spring Street, Los Angeles, California, 90012, Defendant Robert Stein (sued as Rob Stein) ("Defendant"), will, and hereby does, move the Court for an order dismissing the Complaint of Plaintiffs (the "Complaint") in the above captioned matter.

This Motion is made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the basis that: (1) Plaintiffs fail to plead their purported claims with the requisite particularity such that the Complaint fails to state a claim upon which relief may be granted; and (2) Plaintiffs have failed to state sufficient facts to constitute a claim for relief.

This Motion is based upon this Notice of Motion and Motion and supporting documents, including without limitation the accompanying Memorandum of Points and Authorities, the Declaration of Andrew V. Jablon, the papers, pleadings and records on file in this action, and upon such other oral and documentary evidence and argument as may be presented at or before the time of hearing.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on March 21, 2011. (Declaration of Andrew V. Jablon, ¶ 2-7; Exh. "B")

Dated: March 25, 2011

RESCH POLSTER & BERGER LLP

By: /S/
ANDREW V. JABLON
Attorneys for Defendant Robert Stein

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Noticeably absent from the Complaint is any explanation as to why defendant Robert Stein ("Stein") has been named. There are no charging allegations in the Complaint against Stein. Rather, Stein is merely, as Plaintiffs Scott Barbour ("Barbour") and the ZB Family Trust ("Trust", and collectively with Barbour, "Plaintiffs") allege in the Complaint, the "accountant, bookkeeper, and finance executive of one or more of [Bret] Saxon's business entities." (Complaint, ¶ 4.) He is an employee; nothing more, nothing less. Moreover, there are no charging allegations against Stein. In fact, the Complaint only references any specific act by Stein on one occasion – i.e., in Paragraph 28 the Plaintiffs allege that Stein caused to be transferred money lent by the Trust to co-defendant Bret Saxon ("Saxon") – but does not, and cannot, allege that that the act was improper. (See, Section II.C.2, *infra*).

Simply put, Stein has been named as a defendant in this action *not* because of any evidence or even good faith belief in that he might be liable for any alleged wrongdoings. Rather, Stein is caught in the cross-fire of a fight between Barbour and Saxon, due to Barbour and his attorney's malicious intent to name Stein and thereby:

(1) antagonize Saxon[1]; and

(2) induce Stein to provide false testimony about his boss.

In fact, Plaintiffs' counsel, Michael Burke, when pressed on why his clients were going to name Stein when they knew he had nothing to do with any of the alleged activities, responded, "I don't know. I'm just going to start and see."

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[1] Barbour has demonstrated a willingness to do everything in his power to antagonize Saxon, including sending an email to his wife and child. (Declaration of Andrew V. Jablon, ¶4; Exh. "A".)

(Declaration of Andrew V. Jablon ("Jablon Decl."), ¶ 5)

At best, Plaintiff sued Stein

> without knowing how he fit into the picture, apparently hoping that later discovery would uncover something. If Rule 11 is to mean anything and we think it does, it must mean an end to such expeditionary pleadings. "This 'shotgun approach' to pleadings, . . . where the pleader heedlessly throws a little bit of everything into his complaint in the hopes that something will stick, is to be discouraged." *Rodgers v. Lincoln Towing Serv., Inc.*, 596 F. Supp. 13, 27 (N.D. Ill. 1984)

Southern Leasing Partners v. McMullan, 801 F.2d 783 (5th Cir. Miss. 1986).

Accordingly, the issue presented by this Motion is straightforward. Plaintiffs have failed to put forth any allegations against Stein, let alone with the specificity required by *Fed. R. Civ. P. 8* and 9, or *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and its progeny, necessary to state an actionable claim for relief as to Stein. Accordingly, the Motion should be granted and the Complaint, as to Stein, dismissed with prejudice.

II. LEGAL ARGUMENT

A. The Complaint Must Be Dismissed Under *Fed. R. Civ. P.* 12(b)(6) as Plaintiffs Have Failed To Plead Their Claims with the Specificity Required By *Fed. R. Civ. P.* 9(b).

Pursuant to *Fed. R. Civ. P.* 12(b)(6), this Court is required to dismiss the Complaint in "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to

> relief that is plausible on its face." [*Twombly*], at 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid*. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (brackets omitted).

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-1950 (U.S. 2009). Accordingly, "[t]hreadbare recitals of the elements of a claim for relief, supported by mere conclusory statements, do not suffice. . . Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.*, at 1950. Moreover, the Court is *not* "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004).

Here, where a claim sounds in fraud – e..g, Plaintiffs First and Fifth Claims for Relief – the heightened pleading requirements of *Fed. R. Civ. Pro.* 9 apply. Specifically, *Fed. R. Civ. Pro.* 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

As discussed below, the Complaint a meaningless jumble of allegations that simply fail to state a claim. Instead of pleading clear, factual allegations against

each of the named Defendants, Plaintiffs relied on an improper shotgun style of pleading, "using the omnibus term 'Defendants' throughout . . . grouping defendants together without identifying what the particular defendants specifically did wrong. . . . [and] recit[ing] a collection of general allegations toward the beginning of the Complaint, and then 'each count incorporates every antecedent allegation by reference. *Sollberger v. Wachovia Sec., LLC*, 2010 U.S. Dist. LEXIS 66233, *11-12 quoting *Byrne v. Nezhat*, 261 F.3d 1075, 1129-30 (11th Cir. 2001). Simply, Plaintiffs have wholly disregarded the requirements articulated in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and its progeny, as well as the heightened pleading requirements of *Fed. R. Civ. Pro.* 9 for claims associated with fraud.

B. <u>Plaintiffs' First through Fourth Claims for Relief Fail To State Facts Sufficient To State A Claim</u>

1. The First Claim For Relief (Fraud in the Inducement) Contains No Charging Allegations As To Stein.

Plaintiffs' First Cause of Action, for fraud in the inducement, fails to include *any* charging allegations as to Stein.

Fraud in the inducement is a subset of the tort of fraud. *Heinsley v. Oakshade Town Center*, 135 Cal.App.4th 289, 294 (Cal. Ct. App. 2005). It "occurs when 'the promisor knows what he is signing but his consent is induced by fraud, mutual assent is present and a contract is formed, which, by reason of the fraud, is voidable.'" *Id.* at 294-95 (quoting *Rosenthal v. Great Western Fin. Securities Corp.*, 14 Cal.4th 394, 415 (1996)). Thus, Plaintiff must specifically allege the elements of fraud – i.e., "a [1] misrepresentation, [2] knowledge of its falsity, [3] intent to defraud, [4] justifiable reliance and [5] resulting damage." *Gil v. Bank of America, Nat. Assn.*, 138 Cal.App.4th 1371, 1381 (2006) (citing *Universal By-Products, Inc. v. City of Modesto*, 43 Cal.App.3d 145, 151 (1974)). Moreover, as noted above, *Fed. R. Civ. P.* 9(b) requires that "[i]n all averments of fraud or mistake, the

circumstances constituting fraud or mistake shall be stated with particularity."[2]

Here, Plaintiffs have alleged that *Saxon*, not Stein, misrepresented *Saxon's* financial position to induce them to loan the money in dispute. Nowhere in the Complaint is there any allegation that *Stein* made any representations to Plaintiffs, false or otherwise. As a result, Plaintiffs have not, and cannot satisfy their burden allege the first three elements of a fraud claim as to Stein – i.e., a misrepresentation, knowledge of its falsity, and intent to defraud.

Plaintiffs also cannot rely on the alleged misdeeds of Saxon to assert liability on Stein. As noted above, Stein is identified in the Complaint only as the "accountant, bookkeeper, and finance executive of one or more of Saxon's business entities." (Complaint, ¶ 4.) There simply are no allegations of Stein's participation in the purported fraud, or anything to establish liability by Stein. As such, there is nothing in the Complaint that would allow for the purported liability of an employer ("one or more of Saxon's business entities") to spill over to the employee.

2. The Second Claim For Relief For Breach of Contract Contains No Charging Allegations As To Stein.

Again, noticeably absent in the Second Claim for Relief, for breach of contract, are *any* charging allegations as to Stein. To state a cause of action for breach of contract *by Stein*, Plaintiffs were required to allege: (1) a contract with Stein; (2) their performance or excuse for nonperformance; (3) Stein's breach; and

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[2] This comports with California state law pleading requirements, under which this Complaint was initially filed, which prohibits the general pleading of the legal conclusion of fraud; the facts constituting the fraud must be alleged and every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically). *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 216 (1983). The particularity requirement necessitates the pleading of facts which show how, when, where, to whom, and by what means, the allegedly fraudulent activity occurred. *Stansfield v. Starkey*, 220 Cal.App.3d 59, 73 (1990).

(4) resulting damages to Plaintiffs. *See Reichert v. General Ins. Co.*, 68 Cal.2d 822, 830 (1968).

Here, the purported loans were, per the express allegations of the Complaint (and supporting exhibits), made to Saxon and/or his business entities – i.e., *not* Stein. *See*, Complaint ¶ 17 ("Saxon approached Barbour and asked Barbour to loan him $150,000"); Complaint ¶ 27 ("Saxon sought to borrow an additional $250,000. . and transferred $250,000.00 from the ZB Family Trust into Saxon's own personal account"); Complaint ¶ 30 ("Saxon informed Barbour that . . . he needed to borrow $150,000 more"); and Complaint, Exhibit "G" (purportedly confirming loans to Conduit Media, Inc. and Bret Saxon, an individual).

Accordingly, Plaintiffs have failed to allege a contract with Stein, breach of a contract by Stein, or, of course, resulting damages. Accordingly, the Motion should be granted.

3. The Third Claim For Relief For Money Had and Received Does Not Allege A Claim, Both Generally as to All Defendants and Specifically As To Stein.

"A claim for relief is stated for money had and received if the defendant is indebted to the plaintiff in a certain sum for money had and received by the defendant for the use of the plaintiff." *Schultz v. Harney*, 27 Cal. App. 4th 1611, 1623 (1994). Here, Plaintiffs fail to properly allege a claim against *any* Defendant, as the Complaint fails to allege that the money purportedly received by the Defendants was *for the benefit of the Plaintiffs*.

Regardless, Plaintiffs again fail to include *any* charging allegations as to Stein. Plaintiffs specifically allege that the money at issue was received by Conduit Media, Inc. and Saxon, individually. *See*, Complaint ¶ 17 ("Saxon approached Barbour and asked Barbour to loan him $150,000"); Complaint ¶ 27 ("Saxon sought to borrow an additional $250,000 . . . and transferred $250,000.00 from the ZB Family Trust into Saxon's own personal account"); Complaint ¶ 30 ("Saxon

informed Barbour that. . .he needed to borrow $150,000 more"); and Complaint, Exhibit "G" (purportedly confirming loans to Conduit Media, Inc. and Bret Saxon, an individual). There are simply no allegations that Stein received any monies. Moreover, in light of the express allegations to the contrary, the claim fails as to Stein and is not capable of being cured by an amendment.

4. The Fourth Claim For Relief For Breach of Contract Fails As Stein Is Not A Party To The Purported Contract.

Plaintiffs' purported Fourth Claim for Relief alleges breach of Barbour's individual employment contract with defendant TMP. (Complaint, ¶¶ 13 and 62). While the Complaint fails to state a claim against *any* of the Defendants for breach of contract, as the terms of the purported contract are not set forth with the requisite specificity (*see generally*, *In re VeriSign, Inc., Derivative Litig.*, 531 F. Supp. 2d 1173 (N.D. Cal. 2007)), those terms that are alleged make clear that Stein is *not* a party to the subject contract. Accordingly, the Motion to Dismiss as to the Fourth Claim for Relief should be granted. *Reichert*, 68 Cal.2d at 830.

C. <u>Plaintiffs' Fifth Claim For Relief, Based On An Asserted Violation of the Federal RICO Statute, Fails To Set Forth Sufficient Facts To Set Forth An Actionable Claim.</u>

In 1990, Judge Bonner of the Central District of California noted:

> Like other courts, and perhaps Congress, this Court is legitimately concerned about the misuse of civil RICO and the increasingly familiar phenomenon of expanding a straight-forward breach of contract into a claim of promissory fraud. A plaintiff then asserts two or more mailings in furtherance of promissory fraud and, presto, claims a civil RICO violation. Distressingly, this type of pleading inflation has become all too common,

> particularly in the litigious climate of California. Since civil practitioners discovered the RICO statute some ten years ago, it seems that the lure of transforming a simple, single damage contract claim into a treble damage RICO claim has proved irresistible. To sketch what is becoming more frequent is to begin to understand the dangers of abusing the RICO weapon. Even if one ignores the *in terrorem* effect of spurious treble damage suits, the danger of protracted and extraordinarily expensive discovery engendered by civil RICO claims is all too real.

PMC, Inc. v. Ferro Corp., 131 F.R.D. 184, 187 (C.D. Cal. 1990). Twenty-one years later, the RICO statute is still being abused, as evidenced by the Complaint which attempts to raise the specter of a RICO claim without *any* supporting factual allegations.

1. Pleading Requirements Of A RICO Claim

The elements of a RICO claim are: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's 'business or property.'" *Living Designs, Inc. v. E.I. Dupont de Nemours and Co.*, 431 F.3d 353, 361 (9th Cir. 2005). The plaintiff must, of course, specifically allege each of these elements to state a claim. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Further, cases in which RICO claims are predicated upon fraud – such as here, where Plaintiffs make the conclusory allegation of mail and wire fraud – must conform to the particularized pleading requirements of *Fed. R. Civ. Pro.* 9(b). *I.e.*, they must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation. *See Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065-66 (9th Cir. 2004); and *Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991) (*Fed. R. Civ. Pro.* 9 requires that Plaintiffs "detail with particularity the

time, place, and manner of each act of fraud, *plus the role of each defendant in each scheme*." (emphassis added)).

Critically, the heightened pleadings requirements of Rule 9 are strictly applied to RICO claims because Congress enacted RICO "to combat organized crime, not to provide a federal cause of action and treble damages to every tort plaintiff." *Oscar v. University Students Coop Ass'n*, 965 F.2d 783, 786 (9th Cir. 1992). In fact, Courts are to scrutinize RICO cases predicated on mail and wire fraud – such as purportedly alleged here – particularly closely "because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon further scrutiny, do not support it." *Efron v. Embassy Suites, Inc.*, 223 F.3d 12, 20 (1st Cir. 2000).

Plaintiffs' Complaint fails to properly allege a RICO violation – by any of the Defendants – and its defective pleading cannot be cured.

2. Plaintiffs Fail To Allege The Element of "Conduct" By Stein

Initially, Plaintiffs have failed to allege conduct by Stein contributing to the alleged RICO conspiracy. In *Reves v. Ernst & Young*, 507 U.S. 170, 184 (1993), the Supreme Court held that liability under § 1962(c), for violations of the RICO statute, was limited to "those who participate in the operation or management of an enterprise through a pattern of racketeering activity." "In order to 'participate, directly or indirectly, in the conduct of such enterprise's affairs, one must have some part in directing those affairs." While that does not mean that liability is limited to upper management, "the word 'participate' makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs. . . *[but] some part in directing the enterprise's affairs is required*." *Id*. at 179. But differently, "Congress did not mean for § 1962(c) to penalize all who are employed by or associated with a RICO enterprise, but only those who, by virtue of their association or employment, play a part in directing the enterprise's affairs." *Handeen v. Lemaire*, 112 F.3d 1339, 1348-1349 (8th Cir. Minn. 1997).

Bare allegations – such as all that is present here – that each of the defendants "caused" or "permitted" certain events to occur are insufficient for Rule 9(b) purposes under any of the RICO provisions. *See, Lewis on behalf of National Semiconductor Corp. v. Sporck*, 612 F. Supp. 1316, 1325 (N.D. Cal. 1985). For instance, in *Sporck*, the court held that if the plaintiff purports to sue directors, accounting officers, and mid-level employees of one of the defendant corporations under Section 1962(a)-(c), he must delineate with precision the involvement of the different groups of defendants. *Id*. at 1325.

Here, the Complaint fails to allege Stein's role, generally or specifically, within the alleged conspiracy and control of decisions therein. Moreover, the fact that Stein acted as an accountant for a purported RICO enterprise will not, absent more, rise to the level of participation sufficient to satisfy the Supreme Court's pronouncement of the "operation or management" test articulated in *Reves v. Ernst & Young*, 507 U.S. 170 (1993) ("one is not liable . . . unless one has participated in the operation or management of the enterprise itself).

As such, a growing number of courts have held that an attorney or other professional, e.g., accounting services, does not conduct an enterprise's affairs through run-of-the-mill provision of professional services.

> Simply because one provides goods or services that ultimately benefit the enterprise does not mean that one becomes liable under RICO as a result. There must be a nexus between the person and the conduct in the affairs of an enterprise. The operation or management test goes to that nexus. In other words, *the person must knowingly engage in "directing the enterprise's affairs" through a pattern of racketeering activity*. Reves, 113 S. Ct. at 1170.

University of Md. v. Peat, Marwick, Main & Co., 996 F.2d 1534, 1539 (3d Cir. Pa. 1993). Whether an outside contracted professional or an employee-accountant, an

accountant cannot be held liable for RICO violations for performing his or her general financial activities absent evidence of knowingly directing the enterprise's affairs.

Here, other than the introductory paragraph identifying Stein as the "accountant, bookkeeper, and finance executive of one or more of [Bret] Saxon's business entities" (Complaint, ¶ 4), the only other time Stein is described as doing anything is in paragraph 28, wherein it is alleged that

> without any signed agreement from Barbour and without any signed instructions from Barbour to his bank, Defendant ROB STEIN, the accountant and bookkeeper for Saxon and his entities, went to a Bank of America branch and transferred $250,000.00 from the ZB Family Trust into Saxon's own personal account.

Noticeably absent, however, is any allegation that this transfer was not authorized by the Plaintiffs. This cleverly drafted allegation is intentional, as Plaintiff Barbour admitted that the transfer was authorized, a fact that will be discussed in a Rule 11 Motion that Stein will be filing. *See*, Jablon Decl., ¶ 6.

Accordingly, the only allegation against Stein is that he performed financial services for Saxon and his companies. Yet "simply performing services for the enterprise does not rise to the level of direction." *Walter v. Drayson*, 538 F.3d 1244, 1249 (9th Cir. 2008) (holding that knowingly implementing decisions of upper management was insufficient to establish RICO liability); *see also, Just Film, Inc. v. Merch. Servs.*, 2010 U.S. Dist. LEXIS 130230, *31 (N.D. Cal. 2010); and *Graf v. Peoples*, 2008 U.S. Dist. LEXIS 78919, 21-22 (C.D. Cal. Aug. 31, 2008) ("One who has no managerial role is not liable.").

Having failed to allege any *conduct* by Stein in connection with the alleged RICO conspiracy, the claim for relief necessary fails and the Motion should be granted. Moreover, as fishing expeditions in the hope that discovery would later

develop an actionable claim are not permitted (*Southern Leasing Partners v. McMullan*, 801 F.2d 783 (5th Cir. Miss. 1986)), amendment should not be allowed.

3. Plaintiffs Fail To Properly Allege A RICO Enterprise

(a) The Pleading Requirements Of A RICO "Enterprise"

To state a RICO claim Plaintiffs must allege "both the existence of an 'enterprise' and a connected 'pattern of racketeering activity'." *Compagnie de Reassurance D'Ile France v. New England Reinsurance Corp.*, 825 F. Supp. 370 (D. Mass 1973).

A RICO "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, or any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Thus, an enterprise may be a legal entity, such as a corporation, or may be "a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583 (1981). Although an "associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise", *Odom v. Microsoft Corp.*, 486 F.3d 541, 548-53 (9th Cir. 2007), there must be (1) a common purpose, (2) an ongoing organization, and (3) "evidence that the various associates function as a continuing unit." *Id*. at 552-53 (citing and quoting *Turkette*, 452 U.S. at 583). This enterprise must be distinct from the people named as the RICO defendants as well as distinct from the alleged pattern of racketerring activity. *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 (8th Cir. 1989); *United States v. Turkette*, 452 U.S. 576, 583 (1981) (enterprise not established merely by proof of a series of racketeering acts, but must exhibit three characteristics: (1) common or shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from that inherent in a pattern of racketeering). Finally, to plead the existence of an ongoing enterprise, Plaintiffs were required to allege that the enterprise is "a vehicle for the commission of two or more predicate crimes." *Id*. (quoting *United States v. Cagnina*, 697 F.2d 915, 921

(11th Cir. 1983)).

(b) Plaintiffs Have Failed To Meet The Requirements Of Pleading A RICO Enterprise

Plaintiffs' attempt to plead a RICO enterprise is limited to Paragraph 71 of the Complaint, wherein they assert in conclusory fashion only:

> During all relevant times, Saxon, Stein, Conduit, and other entities unknown to Plaintiffs were and are part of an "enterprise" as the term is defined in 18 U.S.C. § 1961(4), having a common or shared purpose, functioning as a continuing unit, engaged in interstate commerce and the activities of which affect interstate commerce, and which has an ascertainable structure distinct from that which is inherent in the conduct of the pattern of racketeering. Plaintiffs are informed and believe that Saxon and/or Stein established numerous subsidiaries or affiliates of IMG, in order to effect the enterprise and deceive investors and creditors. Plaintiffs are informed and believe that Saxon and/or Stein may have used IMG and/or Conduit to effect the enterprise and deceive investors and creditors.

These conclusory allegations do not meet the specificity requirements of *Twombly* and its progeny.

As noted above,"[t]hreadbare recitals of the elements of a claim for relief, supported by mere conclusory statements, do not suffice. . . Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 129 S. Ct. at 1950. What is the common purpose of the purported enterprise? How do the various associates function as a continuing unit? What is the continuity of structure and personnel? How is this

structure distinct from that inherent in a pattern of racketeering? Plaintiffs cannot simply make the statement that there is a RICO Enterprise and not provide any supporting factual allegations.

4. Plaintiffs Have Failed To Allege A Pattern Of Racketeering Activity.

Additionally, Plaintiffs do not plead facts establishing a "pattern of racketeering activity." A "'pattern of racketeering activity' requires at least two acts of *racketeering activity* . .. the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (emphasis added). Significantly, alleged "[b]ad acts, alone, do not qualify as predicate acts for RICO purposes; only those activities set forth in 18 U.S.C. § 1961(1) may serve as the basis of a RICO claim." *Lewis on behalf of National Semiconductor Corp. v. Sporck*, 612 F. Supp. 1316, 1325 (N.D. Cal. 1985).

Here, Paragraph 66 of the Complaint attempts to assert mail and wire fraud as the requisite predicate acts by alleging, *on information and belief*, that "Defendants, and each of them, committed fraud via Internet communications, facsimile transmissions, telephone conversations, mail fraud, and wire transfers occurring in Interstate commerce." Allegations on information and belief, without any specific facts, do not comport with the heightened pleading requirements of *Fed. R. Civ. P.* 9 required for pleading mail and wire fraud.

(a) <u>Plaintiffs Fail To Properly Allege The Predicate Acts Of Mail And Wire Fraud</u>

For Plaintiffs to have properly alleged mail fraud, they were required to plead that: "(1) defendant devised a scheme or artifice to defraud; (2) *defendant used the mails in furtherance of the scheme*; and (3) defendant did so with the specific intent to deceive or defraud." *Blair v. All American Bottling Corp.*, 1988 U.S. Dist. LEXIS 15943, *11-12 (S.D. Cal. 1988) (emphasis added). For example, in *Sun Savings and Loan Association v. Dierdorff*, the Court held mailings to be in furtherance of a

scheme if the completion of the scheme or the prevention of its detection is in some way dependent upon the mailings. *Sun Savings*, 825 F.2d 187, 196 (9th Cir. 1987) (citing *United States v. Sampson*, 371 U.S. 75, 80 (1962) and *United States v. Mitchell*, 744 F.2d 701, 703 (9th Cir. 1984)). Similarly, "a wire fraud violations consists of (1) the formation of a scheme or artifice to defraud; (2) *use of the United States wires or causing a use of the United States wires in furtherance of the scheme*; and (3) specific intent to deceive or defraud." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400 (9th Cir. Cal. 1986).

With respect to both mail and wire fraud, which "share elements and are therefore evaluated under the same framework" (*Bryant v. Mattel*, 2010 U.S. Dist. LEXIS 103851, *20-21 (C.D. Cal. 2010)), *Fed. R. Civ. Pro.* 9(b) requires that the Complaint allege, with specificity, "who (i.e., which defendant) caused what to be mailed when, and how that mail furthered the fraudulent scheme." *Ghouth v. Commodity Services, Inc.*, 642 F.Supp. 1325, 1331-32 (N.D. Ill. 1986). As recently noted by the Southern District of California,

> when a plaintiff relies on charges of wire and mail fraud as the predicate acts of a RICO claim, the factual circumstances of the fraud itself must be pled with particularity as required by Rule 9(b). *Odom*, 486 F.3d at 554; *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991). "Rule 9(b) does not allow a complaint merely to lump multiple defendants together but requires plaintiffs to differentiate their allegations . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Swartz*, 476 F.3d at 764-65 (quotations and alterations omitted); *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989) (plaintiff must

identify role of each defendant in the alleged RICO scheme).

Rich v. Shrader, 2010 U.S. Dist. LEXIS 98267 (S.D. Cal. Sept. 17, 2010)

Here, the Complaint necessarily fails for three reasons: (1) Plaintiffs have failed to allege with the requisite specificity the various Defendants' roles in the purported mail and wire fraud; (2) Plaintiffs have failed to allege the required elements of the predicate acts of mail and wire fraud; and (3) those acts that were alleged, on their face, do not implicate the mail or wires. There are no facts in the Complaint establishing the formation of the scheme, let alone "who (i.e., which defendant) caused what to be mailed [or transmitted over the wires] when, and how that mail [or wire transmission] furthered the fraudulent scheme." *Ghouth v. Commodity Services, Inc.*, 642 F.Supp. 1325, 1331-32 (N.D. Ill. 1986). There are only the conclusory recitations of the elements of the claim found in Paragraphs 71 77.

These defects cannot be rectified by amendment as each of the alleged fraudulent statements and related transactions were, per the express allegations of the Complaint, *not* done via the mails or wires. *See*, Complaint ¶ 17 ("Saxon approached Barbour and asked Barbour to loan him $150,000.00 for two weeks"); ¶28 and Exh. "D" (in-person transfer of funds between two Bank of America accounts located at the same branch); ¶ 30-31 and Exh. "F" (alleging upon Saxon's return from Egypt, requested from Barbour an additional $150,000 which was provided by check).[3]

Accordingly, the Fifth Claim for Relief fails as to all Defendants, and the Motion by Stein to Dismiss the same should be granted.

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[3] There is also no allegation that the purported misdeeds alleged in Paragraphs 45 and 46, for which Plaintiffs do not allege that they were damaged, involved mail or wire fraud.

(b) As A Separate And Independent Basis For Granting The Motion As To Stein, Two Predicate Acts Are Not Alleged

RICO requires that each of the defendants

> directly or indirectly conduct or participate in the enterprise's affairs through a pattern of racketeering activity. *Id*. Thus, rather than requiring that the enterprise itself conduct the racketeering activity, RICO simply requires a "nexus" between the enterprise and the racketeering activity. *Id*. As the Supreme Court stated in *Sedima*, the essence of a violation of section 1962(c) "is the commission of those acts [of racketeering] in connection with the conduct of an enterprise." *Sedima*, 105 S. Ct. at 3286 (emphasis added).

Blake v. Dierdorff, 856 F.2d 1365, 1370-1371 (9th Cir. Cal. 1988) (holding that two or more predicate acts are required to satisfy RICO's pattern requirement and that an allegation of only one possible predicate act by defendant fails to state a RICO claim against that particular defendant).

Here, the only alleged activity undertaken by Stein was,

> without any signed agreement from Barbour and without any signed instructions from Barbour to his bank, Defendant ROB STEIN, the accountant and bookkeeper for Saxon and his entities, went to a Bank of America branch and transferred $250,000.00 from the ZB Family Trust into Saxon's own personal account.

(Complaint, ¶ 28.) Even if the Court were to ignore that there is no allegation that this transfer was unauthorized (as discussed above in Section II(C)(2)), and that the action cannot constitute wire fraud (as it was an in-person transfer of funds between

two Bank of America accounts located at the same branch), this is the sole act by Stein identified in the Complaint. To state a claim against Stein, however, Plaintiffs were *required* to allege *two or more* predicate acts by Stein. *Sun Savings*, 825 F.2d at 193. The complaint alleges only one possible predicate act by Stein: his transfer of funds as authorized by Plaintiffs. Thus, the complaint fails to state a RICO claim against Stein.

D. Leave to Amend Should Be Denied

Finally, leave to amend should not be granted because "it is absolutely clear that no amendment can cure the defects." *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995); *see also Lopez v. Smith*, 203 F.3d 1122, 1126 (9th Cir. 2000). Here, the nature of the defective pleadings are such that no amendment can cure the defects, and any attempt to do so would only further the malicious prosecution against Stein. Accordingly, leave to amend should be denied and Stein dismissed with prejudice from this action.

III. CONCLUSION

Accordingly, for the reasons set forth above, defendant Robert Stein respectively requests that the Court grant his Motion in its entirety and dismiss the complaint as to him, in its entirety, without leave to amend.

Dated: March 25, 2011 RESCH POLSTER & BERGER LLP

By: /S/
ANDREW V. JABLON
Attorneys for Defendant Robert Stein